**Rule 16, Ariz. R. Crim. Proc.**

**State's Response to Defendant's Motion to Preclude Blood Test Results and Expert's Opinions under *Crawford v. Washington***

> A doctor's testimony about results of tests performed by technicians does not implicate *Crawford*'s confrontation clause/hearsay concerns because test results are not "testimonial" under *Crawford*.

The State of Arizona, by and through undersigned counsel, respectfully requests that the Court deny the defendant's motion to preclude the results of the blood tests as well as Dr. Raymond Kelly's opinions regarding those tests. The State opposes the motion for the reasons set forth in the following Memorandum.

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. FACTS:

On December 5, 2001, while the defendant was driving a sports car that had been reported stolen, he ran a red light and hit another vehicle. The occupants in that second vehicle sustained substantial injuries as a result of the crash, and police found methamphetamine in the defendant's possession.

MCSO sent a sample of the defendant's blood to NMS Laboratories in California to determine if there were drugs in the defendant's blood and, if so, to quantify the amount. The lab test revealed a methamphetamine level of 360 ng/ml and an amphetamine level of 63 ng/ml. Dr. Kelly, then the director of NMS Laboratories, concluded that with that level of drugs in his blood, the defendant was impaired at the time of the crash. He based this opinion on the test results, his review of the police reports and DRE evaluations, and his own knowledge and research.

The defendant now argues the test results should be precluded and that Dr. Kelly should not be allowed to testify. The defendant contends that, because the State is not calling the employees at Dr. Kelly's lab who actually performed the tests, admitting the

results and Dr. Kelly's opinion would raises Confrontation Clause issues under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). The State disagrees, for the following reasons.

## II. STATEMENT OF LAW:

### A. Pre-*Crawford* case law allowed experts to testify based on lab reports.

The defense in this case acknowledges that under prior case law, the doctor's testimony would come in under Rule 703, Ariz. R. Evid., and that the non-testifying expert's opinion would not be a hearsay use. There is very little post-*Crawford* case law on this specific issue. However, before *Crawford* was decided, the Arizona Supreme Court specifically addressed this issue and found that an expert's testimony based on a lab report posed no Confrontation Clause issue.

In *State v. Rogovich*, 188 Ariz. 38, 42, 932 P.2d 794, 798 (1997), the Arizona Supreme Court found that Rule 703 applied to the issue of whether one criminalist can testify in lieu of another criminalist. In *Rogovich*, a doctor from the Medical Examiner's Office conducted an autopsy and prepared an autopsy report. Because that doctor left that office before trial began, the trial court allowed a different doctor from that office to testify at trial about the autopsy report and the causes of death. On appeal, the defendant argued that the trial court erred by allowing the second doctor to testify from the first doctor's reports. The Court found no error, stating that the second doctor's reliance on the first doctor's report and opinions "cannot seriously be disputed" under *State v. Lundstrom*, 161 Ariz. 141, 148, 776 P.2d 1067, 1074 (1989). The Court stated:

> Rule 703 allows a testifying expert to reach and express an opinion in the courtroom in the same manner he or she would in the laboratory or other work place. Any other rule would produce absurdity. For example, no orthopedic surgeon could testify unless the radiologist who read the X-rays on which the surgeon relied was first called to testify, and the radiologist

> could not testify until the technician who took the X-rays had testified. Presumably, the process could continue without end. We therefore reject the argument and avoid the nightmare that would exist without application of Rule 703.

*Rogovich*, 188 Ariz. at 42, 932 P.2d at 798. The *Rogovich* Court also found no Confrontation Clause problem:

> Admitting the substance of a non-testifying expert's opinion is not a hearsay use at all. Facts or data underlying the testifying expert's opinion are admissible for the limited purpose of showing the basis of that opinion, not to prove the truth of the matter asserted. Testimony not admitted to prove the truth of the matter asserted by an out-of-court declarant is not hearsay and does not violate the confrontation clause. Thus, the *defendant's confrontation right extends to the testifying expert witness, not to those* who do not testify but *whose findings or research merely form the basis for the witness's testimony*.

*Rogovich*, *id*. [emphasis added, citations omitted].

*Rogovich* relied in part on *Reardon v. Manson*, 806 F.2d 39 (2d Cir. 1986), holding that a toxicologist could testify about the findings made by chemists under his supervision. In *Reardon*, the State had a toxicologist testify about drug test results he had received from chemists that he supervised. The defendants argued on appeal that the toxicologist should not have been allowed to testify about what the chemists told him unless the State first showed that the chemists themselves were unavailable. The Court disagreed, stating:

> The unavailability rule announced in [*Ohio v.*] *Roberts* [448 U.S. 56 (1980)] was developed in a series of cases in which the prosecution offered written records of prior testimony in place of live testimony at trial, and the rule should not be extended mechanically to other factual contexts. The confrontation clause is not necessarily violated by the prosecution's failure to produce a hearsay declarant for cross-examination at trial where the "utility of trial confrontation" would be "remote" and of little value to either the jury or the defendant. *Ohio v. Roberts, supra*, 448 U.S. at 65 n.7. ...

*Reardon v. Manson*, 806 F.2d 39, 41 (2d Cir. 1986) [citations omitted].The Court reasoned that because the lab performed some 20,000 tests every year, the chemists who actually performed the tests almost certainly could not independently recall the particular tests involved. Instead, the chemists would have to base their testimony on their lab notes, which

the toxicologist "was well qualified to interpret." Any testimony the chemists could give about the likelihood of testing error "necessarily would have involved broad statements as to general practices and probabilities within the laboratory," and the toxicologist could testify about those matters. *Id*. The Court further noted:

> It is rare indeed that an expert can give an opinion without relying to some extent upon information furnished him by others. … Expert reliance upon the output of others does not necessarily violate the confrontation clause where the expert is available for questioning concerning the nature and reasonableness of his reliance.

*Id.* at 42 [citations omitted].

Similarly, in another pre-*Crawford* case, *United States v. Smith*, 964 F.2d 1221 (D.C.Cir. 1992), a supervisor introduced a copy of an analyzing chemist's drug analysis report and testified to its accuracy. The Court held that regardless of whether or not the report itself was admissible as a business record, the testimony was permissible under Federal Rule of Evidence 703. *Id.* at 1223. Thus, it is clear that before *Crawford*, the doctor's testimony here was admissible.

**B. *Crawford v. Washington* does not bar the doctor's testimony.**

*Crawford* itself does not address the opinions of non-testifying experts, and mentions that business records, for example, are by their nature not testimonial. *Crawford*, 541 U.S. at __, 124 S.Ct. at 1367. *Crawford* was concerned with *testimonial* hearsay:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law — as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

*Id.* at __, 124 S.Ct. at 1374.

In this case, if the report underlying the doctor's opinion is considered hearsay at all, it is closer to a business record than to the testimonial examples that are clearly the concern in *Crawford.*

In *People v. Johnson*, 121 Cal.App.4th 1409, 18 Cal.Rptr.3d 230 (2004), the county crime lab analyzed a rock of cocaine that the defendant had been seen selling. The defendant argued that admission of the hearsay laboratory report at his probation revocation hearing violated his right to confrontation under *Crawford.* The Court noted that the Sixth Amendment did not apply to probation revocation hearings, although probationers may have a limited right of confrontation under the Due Process clause. However, the Court still found *Crawford* inapplicable because the lab report was not a substitute for live testimony, but was routine documentary evidence. "A laboratory report does not 'bear testimony,' or function as the equivalent of in-court testimony. If the preparer had appeared to testify at [the defendant's] hearing, he or she would merely have authenticated the document." *Id.* at 1412, 18 Cal.Rptr.3d at 233.

In *People v. Goldstein*, 786 N.Y.S.2d 428 (2004), the New York Supreme Court, Appellate Division, held that *Crawford* did not preclude a psychiatrist from relying on information from sources such as psychiatric records, statements by witnesses to the incident, and past incidents involving the defendant. The Court reasoned that the doctor used these non-testimonial hearsay statements to formulate his opinion, and that these statements were not offered as "proof of facts stated by the hearsay declarants." *Id*. at 432. *But see People v. Rogers*, 8 A.D.3d 888, 780 N.Y.S.2d 393 (2004), holding that a lab report on the victim's blood was improperly admitted as a business record and was "testimonial" under *Crawford*.

In *State v. Dedman*, __ N.M. __, 102 P.3d 628 (2004), the New Mexico Supreme Court held that a blood alcohol report was nontestimonial evidence, so the nurse who drew the blood did not have to testify. (However, the forensic toxicologist who performed the test did testify.) The report was neither investigative nor prosecutorial and was admissible under the public records hearsay exception. The Court also found that there was no violation of the defendant's right of confrontation under *Crawford* because the blood alcohol report was not testimonial evidence. *Id.* at __, 102 P.3d at 636-37. The Court further concluded that *Ohio v. Roberts* still applied to nontestimonial hearsay evidence. *Id*. The State did not have to show that the nurse was unavailable, because the utility of cross-examining her was remote. The lab report was a public record bearing adequate indicia of reliability; there was no evidence that the report was untrustworthy; and no one questioned the reliability of the test procedures or results. Thus, the State satisfied *Roberts*. *Id.* __, 102 P.3d at 639.

In *State v. Doe*, 103 P.3d 967 (Idaho 2004), a child made statements to her mother that the trial court found were excited utterances, and the child and mother also made statements to an attending physician. The Idaho Supreme Court held that all of the statements were nontestimonial hearsay under *Crawford* and *Roberts*, but stated that it would continue to apply the *Roberts* standard to nontestimonial hearsay. *Id*. at 972. Because "excited utterances" was a firmly rooted hearsay exception, "the evidence satisfied the *Roberts* standard and did not violate the Confrontation Clause." *Id.* at 972. The statements made to the physician were properly admitted under Rule 703 as a basis for the physician's medical opinion. "Confrontation Clause analysis under *Crawford* does not apply where, as in the case of foundational evidence, the probative value of a statement is not dependent on its reliability." *Id*. at 973

Without citing any authority, the defendant argues in his motion that scholarly texts and statements to treating physicians were not testimonial. However, he does not clearly

explain why the toxicology report in his case would be testimonial, other than the fact that it was done at the request of law enforcement. To accept that such reports would be testimonial and subject to *Crawford* limitations would open the door to the absurd. No expert would be allowed to testify based on any analysis he or she personally did not do. This holding would not, by that standard, simply bind the State. Indeed, defense experts, who almost never do the challenged analysis, would face similar issues. MVD custodians who commonly testify about the status of a defendant's license would not be allowed to testify unless the State could provide the clerk who physically typed each entry into the computer on a defendant's record. Simply put, the defendant's interpretation of the issues in *Crawford* would render expert testimony moot, which is exactly the scenario Rule 703 was designed to prevent.

Thus, the law appears to be clear that Dr. Kelly, who was the director at NMS Laboratories and is familiar with the procedures and requirements followed by those working under his supervision, would be allowed to testify in lieu of those who actually performed the chemical analysis. Moreover, Rule 703 allows an expert to base his opinions on anything, including hearsay, thus justifying Dr. Kelly's opinion that the defendant in this case was impaired by methamphetamine at the time of the crash. Therefore, this Court should deny the defendant's motion.

## III. CONCLUSION:

*Rogovich* and similar cases appear to survive *Crawford,* because a medical or laboratory report that is the underlying basis for an expert's opinion is either not offered to prove the matter asserted, is nontestimonial, or both. Merely because law enforcement sends a sample to an independent lab does not make the report testimonial. It is not being used to prove defendant's guilt or innocence. Determining the nature and quantity of drugs in a sample is a neutral scientific function. The expert then forms an opinion on the level of impairment based on the test results and other information. A defendant maintains the right to confront and cross-examine the testifying expert, whose opinion is the evidence being offered. The defendant here reads *Crawford* too broadly by inferring that it would extend to the bases of expert opinions, particularly when the information relied upon is documentary.

As a side note, the State wishes to note that NMS Laboratory in California is now defunct. The State does not know the location of the criminalists that tested the methamphetamine; therefore, the criminalists are unavailable for trial. Despite this fact, their availability status does not change the proper conclusion in this case. As Rule 703 clearly states, an expert can rely on anything, including hearsay, when rendering an opinion. Dr. Kelly was the director of the facility at the time the defendant's blood sample was tested. He knows the procedures of the laboratory and can tell whether proper procedures were followed during testing. Dr. Kelly is familiar with the laboratory equipment and the quality of work of the person who performed the quantitative analysis. The State of Arizona requests that the Court deny the defendant's motion to preclude the results of the blood tests performed by NMS laboratories as well as Dr. Raymond Kelly's opinions regarding those tests.